

In re) Fair Hearing No. J-01/08-36
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 Appeal of)

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL) substantiating a report that he abused and neglected a disabled adult for whom he was a caregiver in his home. The issue is whether the Department has met its burden of proof that the alleged incidents occurred, and, if so, whether the petitioner's actions meet the statutory definitions of abuse and/or neglect.

1. J.V. is a thirty-five-year-old man with severe cerebral palsy. He is wheelchair bound and has little control over his body movements. He requires assistance with virtually all aspects of his personal care. He is mentally competent but non-verbal, and relies on a communication board to make himself understood.

2. The bases of the Department's actions in this matter are set forth as follows in the Commissioner's decision dated January 10, 2008:¹

The Adult Protective Services division received a report alleging that you had hit JV, a vulnerable adult for whom you provided a home and care. The report said this occurred during an altercation when JV was upset because he misunderstood a phone conversation that he had overheard. He was removed from your home. The investigator interviewed him, and JV told her that you had hurt him. He told her that you had hit him, and that you fed him roughly by shoving a spoon too far into his mouth. He also said that you left him alone at home without food, water, or toileting him. He told her that he had not said this in the previous investigation because he was afraid. He said that you had told him he would have to return to the nursing home in New York if he lost his placement with you.

3. The petitioner appealed this decision on January 25, 2008. Following several continuances at the parties' request hearings were held on June 26 and July 16, 2008. At the hearing the Department's primary witness was J.V., the alleged victim, who testified using a letter board facilitated by an aide. J.V. appeared competent and answered appropriately all the questions he was asked by the parties' respective attorneys. By agreement of the parties, the petitioner was not present in the room with J.V., but he observed J.V.'s testimony (apparently unbeknownst to J.V.)

¹ The year that appears on the date of the Commissioner's decision, 2007, appears to be in error.

through specially designed one-way glass installed in the room where the examination took place.

4. J.V. testified that when he lived in the petitioner's home the petitioner "slapped" him many times, treated him roughly, shoved a spoon down his throat during feeding, swore at him, and frequently left him alone for extended periods of time. J.V. stated he felt intimidated by the petitioner and that the petitioner repeatedly threatened to "ship his ass back to New York" if he complained to anyone. He testified that his case manager had told him that there were no other placements for him in Vermont. J.V. admitted, however, that overall he and the petitioner had a "playful relationship".

5. J.V. further testified that in December 2006 he had "had enough" of living with the petitioner, made the above complaints to his case manager, and asked to move. At the hearing, J.V. could not provide specific dates or any other time context for his allegations, other than that the incidents had happened "many" times.

6. It appears that prior to moving to Vermont J.V. had lived in a nursing home in New York, and that this had been a particularly bad experience for him. J.V. stated that he moved to Vermont about seven years ago.

7. Other witnesses testified that in 2003 J.V. was living in a private home in Vermont under the auspices and supervision of the community home health agency. At that time the petitioner was employed by the community home health agency as J.V.'s home health aide, and he worked with J.V. in J.V.'s home on a daily basis. At that time the petitioner's mother became J.V.'s representative payee for SSI.

8. About three years ago, following a brief hospitalization, followed in turn by a brief community placement in another private home, J.V. came to live in the petitioner's home.

9. J.V.'s case manager at the home health agency during most of the time in question testified (as the petitioner's witness) that J.V. has "behavioral issues" that have affected his ability to participate in community activities, and which have caused problems with all his home placements.

10. J.V.'s case manager also testified that from the outset there were "conflicts" between the petitioner and J.V. mostly around J.V.'s complaints about being "bored" and the petitioner not taking him out enough.

11. The case manager testified that between April and December 2006 she saw J.V. on a weekly basis and that two

times a month she would make unannounced visits at the petitioner's home. She stated that during this time she never saw, nor did J.V. complain to her about, rough or inappropriate treatment.

12. In August 2006 the Department received a complaint, apparently initiated by an unnamed third party, about the petitioner's treatment of J.V. At that time a meeting was held with J.V., his case manager, a Department investigator, and the Department's long-term care clinical coordinator for its Choices for Care program. The petitioner was not at the meeting, but was interviewed separately, apart from J.V., later the same day.

13. J.V.'s case manager testified that in addition to the above meeting with J.V. and representatives from the Department, she met several times alone with J.V. during this time. At no time did J.V. complain about either abuse or being left alone by the petitioner.

14. The case manager was clear in her testimony that she had offered other placement options to J.V. and had "reassured" him "multiple times" that he would not have to go back to New York if he left the petitioner's home. She testified that she believed J.V. understood that he had other

placement options available to him in Vermont, and that these options included private homes and residential facilities.

15. At the hearing, the Department's clinical coordinator who had attended the August 2006 meeting, also testified as a witness for the petitioner. She stated that she had worked with J.V. before 2005 when, in a previous job, she had been a supervisor at the home health service in J.V.'s community. She stated that the primary purpose of the meeting held in August 2006 was to give J.V. other placement options in light of the complaints the Department had received regarding the petitioner.

16. The coordinator stated that J.V. repeatedly told them that he did not want to return to New York, and that they had assured him that would not be the case. She agreed with the case manager that at the meeting J.V. specifically denied all the allegations of physical abuse and intimidation, and made no other complaints about the petitioner. She stated that J.V. told them that he and the petitioner were "just playing" when the petitioner swore at him.

17. Following that meeting, the Department determined that the complaints of abuse had not been substantiated. It was also determined that the petitioner had not left J.V.

alone for inappropriate amounts of time. However, because there had been no prior guidelines in J.V.'s case plan, specific provisions were added limiting such time to two hours with access to "lifeline". The Department also advised the petitioner to "tone down" his horseplay and the language he used with J.V.

18. In December 2007, following an outburst by J.V. in his home, the petitioner called the community home health agency to request that it find another placement for J.V. J.V.'s case manager immediately went to the home and spoke with J.V. It was at this time that J.V. alleged for the first time that the petitioner had "hit" him. When the case manager informed J.V. that this allegation meant that she was required to remove him from the petitioner's home immediately, J.V. became upset and stated he did not want to leave. J.V. stated that the petitioner had not hit him that day, but sometime in the past.

19. The case manager testified that she did not feel that J.V. was afraid of the petitioner.

20. J.V. was moved from the petitioner's home to an emergency placement that day. He has since found a permanent placement, and he has not lived with the petitioner since that time.

21. Following an investigation of this incident the Department's investigator (not the same one who had conducted the investigation in summer 2006) concluded that the petitioner had physically abused, neglected, and emotionally intimidated J.V. sometime in the past.²

22. The petitioner testified in his own behalf at the hearing. There is no dispute in this matter regarding the petitioner's version of the events that led up to his calling J.V.'s case manager on the evening in question in December 2006. The petitioner had recently taken in a second handicapped resident into his home, and J.V. had become petulant and jealous of the attention that the petitioner had been giving this individual. On the day in question the petitioner and J.V. had a conversation about J.V. believing that his respite provider wanted him to move into her home. The petitioner told J.V. that if that is what J.V. wanted, he would give a thirty day notice to the home health agency. The petitioner stated that later that evening J.V. overheard a phone conversation between him and a family member about "beds being available". The conversation was actually about beds being for sale at a local motel that had gone out of business, but J.V. thought that the petitioner was making

² In her review decision, the Commissioner seems confused on this point.

arrangements to have him move out. At any rate, J.V. went into the living room in a rage and knocked over the petitioner's Christmas tree. The petitioner decided then and there that he could no longer have J.V. living with him, and he called the home health agency to have J.V. moved elsewhere.

23. As noted above, there is no dispute that J.V. did not make any accusations against the petitioner's treatment of him until after the petitioner had told him he had to leave the petitioner's house.

24. The Department's investigator noted that the petitioner was candid and cooperative throughout the investigation. In the investigation and at the hearing the petitioner admitted that he had at times engaged in "rough" horseplay with J.V. and had used coarse language, but that this was reciprocal, and reflected the "joking" relationship he felt he had with J.V. The petitioner stated that he "toned down" this behavior considerably when the Department requested him to so in the summer of 2006. The petitioner adamantly denies he ever hurt J.V., or that J.V. ever indicated that he had done so. He also denies he ever left J.V. alone for more than two hours.

25. The petitioner admits that *he* had understood that J.V. *would* have to go back to New York if the placement with him did not work out. Although the petitioner denied it, the specific nature of J.V.'s testimony in this regard (unlike his vague descriptions of the alleged physical abuse) lead the hearing officer to conclude that the petitioner at some time communicated to J.V. that he would have to go back to New York if he could not live with the petitioner.

26. This begs the question, however, of the timing of this communication, and whether it was meant or perceived as a "threat". As noted above, the testimony of J.V.'s case manager is clear and unequivocal that in the summer of 2006 she had clearly communicated to J.V. that he would *not* be returned to New York if he did not stay with the petitioner.

27. In a case such as this, where only two people can ever really know the truth, it can be difficult not to credit a vulnerable adult who complains of physical abuse and emotional intimidation. Based on all the testimony, however, it is found that the petitioner was the more credible witness in this matter.

28. In his testimony J.V. made no mention of his case manager's reassurances to him that he would not be returned to New York. He also did not acknowledge that he did not

make his complaints in this matter until after the petitioner had initiated having him removed from the house after he had engaged in a destructive tantrum. This severely undermines his subsequent claims that he was too intimidated to report prior alleged abuse by the petitioner in a timely manner.

29. As noted above, the petitioner has been candid and consistent in his version of the events in question, most of which was corroborated and supported by other witnesses who have a professional duty to protect J.V.'s safety and well being.

30. The petitioner, who is a licensed nurse's aide (LNA), has remained working for the same home health agency as a nursing assistant caring for other disabled individuals.

ORDER

The Department's decision substantiating abuse and neglect is reversed.

REASONS

The Commissioner of the Department of Disabilities, Aging and Independent Living (DAAIL) is required by statute to investigate allegations of abuse, neglect and exploitation of vulnerable adults, and to keep those records that are "substantiated" in a registry under the name of the person

who committed the abuse. 33 V.S.A. §§ 6906 and 6911(b). If a report has been substantiated, the person who has been found to have committed abuse may apply to the Human Services Board for relief that the report is not substantiated. 33 V.S.A. § 6906(d). At these hearings the burden of proof is on the Department.

The statutes identified by the Department in its substantiation of "abuse" provide as follows, at 33 V.S.A. § 6902:

(1) "Abuse" means:

. . .

(B) Any conduct committed with an intent or reckless disregard that such conduct is likely to cause unnecessary harm, unnecessary pain or unnecessary suffering to a vulnerable adult;

. . .

(E) Intentionally subjecting a vulnerable adult to behavior which should reasonably be expected to result in intimidation, fear, humiliation, degradation, agitation, disorientation, or other forms of emotional distress;

. . .

(7) "Neglect" means purposeful or reckless failure or omission by a caregiver to:

(A)(i) provide care or arrange for goods or services necessary to maintain the health or safety of a vulnerable adult, including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services, unless the caregiver is acting pursuant to the

wishes of the vulnerable adult or his or her representative. . .

As noted above, this case, unfortunately like many others of this nature, boils down to the credibility of the alleged victim versus that of the petitioner. The Department, in its investigation and review of the matter chose to credit J.V.'s allegations. While it cannot be concluded that this was unreasonable, having heard mostly the same evidence in a *de novo* hearing the hearing officer simply does agree with the Department's assessment of credibility.

Inasmuch as it is found that the Department's decision substantiating abuse and neglect in this matter is not supported by a preponderance of credible evidence, that decision must be reversed.

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